Drew Division of Ashland Chemical Company, a division of Ashland Oil, Inc. *and* Teamsters Industrial and Allied Workers Local No. 97, International Brotherhood of Teamsters, AFL–CIO. Case 22–CA–21748

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On August 12, 1999, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt his recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Drew Division of Ashland Chemical Company, A Division of Ashland Oil, Inc., Kearny, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lisa Pollack, Esq., Newark, New Jersey, for the General Counsel.

David Grossman, Esq. (Schneider, Goldberger, Cohen, Finn, Solomon, Leder, & Montalbano), Kenilworth, New Jersey, for the Union.

David Kadela, Esq. (Schottenstein, Zox, & Dunn), Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on December 16, 1996, by Teamsters Industrial and Allied Workers Local No. 97, International Brotherhood of Teamsters, AFL–CIO (Union), a complaint was issued against Drew Division of Ashland Chemical Company, a Division of Ashland Oil, Inc. (Respondent) on October 30, 1998.

The complaint alleges essentially that Respondent unlawfully locked out employees in an effort to modify a collective-bargaining agreement that was due to expire, and that Respondent engaged in such conduct less than 60 days from the time it received the Union's notification that it wished to terminate the collective-bargaining agreement. It is alleged that Respondent's conduct violated Sections 8(a)(5) and (1) and 8(d) of the Act.

Respondent's answer denied the material allegations of the complaint, and on April 6, 1999, a hearing was held before me in Newark, New Jersey.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the follo wing

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) and 8(d) by locking out its employees within 60 days from the Union's notification of its intent to terminate their contract (8(d)(1) notice), the judge relied on *Carpenters Dist. Council of Denver*, 172 NLRB 793 (1968), in which a union was found in violation of Sec. 8(d)(4) for striking within 60 days of the employer's Sec. 8(d)(1) notice. Chairman Hurtgen and Member Truesdale disagree with *Carpenters*. Rather, they find the analysis of Sec. 8(d)(3) notice obligations set forth in *United Artists Communications*, 274 NLRB 75 (1985), which followed the Seventh Circuit Court of Appeals' decision in *Hooker Chemical & Plastics Corp. v. NLRB*, 573 F.2d 965 (1978), to be more persuasive authority. See also *NLRB v. Painting Contractors*, (*Peoria Painting*) 500 F.2d 54, (7th Cir. 1974), denying enf. 204 NLRB 345 (1973). Further, they would apply the reasoning therein to 8(d)(1) cases as well as 8(d)(3) cases, inasmuch as both notice provisions are integral parts of the same statutory scheme. Accordingly, they would overrule *Carpenters*. Nonetheless, in the absence of a majority to overrule *Carpenters*, Chairman Hurtgen and Member Truesdale concur in the adoption of the judge's decision in this case.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001).

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation having its office and place in Kearny, New Jersey, has been engaged in the manufacture and sale of chemicals and related products. Annually, Respondent sold and shipped from its Kearny, New Jersey facility, goods valued in excess of $50,000 directly to points outside New Jersey. I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

THE FACTS

1. The Union's Notification of Termination of the Contract

The Union represents Respondent's approximately 50 full-time and regular part-time production and maintenance employees and warehouse employees at the Kearny facility. The collective-bargaining agreement at issue here ran from December 15, 1993 through December 14, 1996.[1] It provides in relevant part:

> In the absence of written notice given at least 60 days prior to the expiration date by either party to the other of intention to terminate, this Agreement shall automatically be renewed for a period of another year.
>
> The procedure to be followed in the event such notice of termination shall be given is the procedure set forth in the Labor Management Relations Act of 1947, as amended.
>
> If, following receipt of such notice, such negotiations have not been concluded within the 60 day period, this Agreement may be extended for an additional period of 30 days from its termination date, upon 15 days' notice in writing by either party to the other.

On October 28, the Union sent a letter to Respondent which stated that in accordance with the contract, "notice is hereby given you for the purpose of terminating the old agreement and entering into negotiations for a new one." The Union also sent a notice that day to the Federal Mediation and Conciliation Service. Respondent received the notices the following day, on October 29.

Pursuant to the terms of the contract, which required 60 days notice prior to the December 14 expiration, the notice sent by the Union was not timely.

Kurt Reidinger, Respondent's human resources manager, was surprised that he did not receive timely notice of termination, and would have preferred that the contract be automatically renewed for 1 year as provided in the contract if timely notice had not been served.

However, the Union, which had arbitrations pending, agreed to settle or withdraw those grievances and to withdraw an unfair labor practice charge, and in exchange Respondent agreed not to insist that the notice was not timely received. Accordingly, by November 13, both parties agreed that negotiations for a successor agreement should be undertaken. On that date, the Respondent sent a letter to the Union acknowledging that it was "entering into negotiations."

[1] All dates are in 1996 unless otherwise stated.

2. The negotiations

The first negotiation session was on November 21, at which time the Union said that it was not yet ready to exchange proposals inasmuch as Bill Hill, the Union's business agent, had not reviewed the Union's proposal.

On November 26, the parties met and exchanged their proposals. Further negotiations were held on December 3, 5, 11, and 13.

3. The events of December 13

The final bargaining session took place on December 13. It began at about 9 a.m. and ended between 9:30 and 10 p.m.

Respondent's official Reidinger testified that he did not believe that much progress had been made at that session toward reaching agreement on a successor contract. The major issue was the amount of money to be contributed to the pension fund. Reidinger stated that union official Roy McClam asked for Respondent's last and final offer, adding that the parties were at impasse.

Respondent presented its final offer, and asked McClam if the Union's negotiating committee would recommend that it be ratified by its members. McClam replied that the committee would not recommend it for ratification when the members voted on Monday morning. McClam asked that the voting take place at the plant, and Reidinger refused. Reidinger did not recall any union official requesting that day that the contract term be extended.[2]

Reidinger stated that he expected negotiations to continue, and believed that McClam would agree to negotiate the following day, Saturday, after the presentation of Respondent's final offer, noting that he was "shocked" when McClam "refused to continue to negotiate."

Prior to December 13, Respondent had begun to make preparations for either a lockout or a strike by making arrangements with its corporate security office to "secure" the site in the event of either occurrence.

Reidinger stated that on the evening of December 13, he made the decision to lock out the employees because he "fully anticipated a strike" when the vote on the final contract was taken, and also because the Union had refused to continue to negotiate and refused to recommend the Respondent's final offer. Reidinger also stated that other reasons for the decision to lock out the employees included union negotiator Doyce (Gene) Stephenson's notice to the employees to clear out their lockers, an unusual chemical spill which had occurred that day, and the alleged slow down of work.[3] In fact, Reidinger believed, even before negotiations began in November, that the Union intended to strike because of its "confrontational approach." Union negotiator Stephenson testified that there was no slow down, no sabotage of equipment or products, and no discussion of these matters among union representatives.

In fact, union negotiator Stephenson testified that a strike was a "possibility" and that the Union made certain preparations toward that end—including notifying its members to remove personal items from their lockers.

[2] Reidinger stated that during the negotiations, Joe Patalero, the Union's chief trustee requested that the contract be extended. That was not at the December 13 meeting, however.

[3] Although the spill could not be attributed to the Union, Reidinger was informed that similar incidents occurred at the end of prior negotiations.

Reidinger further stated that because of the volatile and hazardous nature of the chemicals Respondent produces, and the way it produces them, in batches, a strike in the middle of the production process would be dangerous to employees and would cause damage to the product. That factor, too, played a part in Respondent's decision to lock out the employees. Thus, it was a major concern to Respondent as to how to stop the production process in the event of a strike. John Orlowski, Respondent's plant manager who participated in negotiations, stated that he had concerns about employees not completing certain tasks, and leaving chemical lines full, thereby creating waste and hazardous conditions in the plant. He believed that negotiations were not progressing well.

Another factor in the decision to lock out employees was McClam's request that the ratification vote take place at the plant on Monday morning, following the expiration of the contract. Reidinger stated that based on his expectation that the proposed contract would be rejected and a vote taken to strike, he did not believe that it was appropriate to have striking employees in the plant. In that regard, he bore in mind that the booklet *The New Blue Collar Movement* authored by Stephenson, called for "civil direct action" and the physical interference with an employer's ability to produce and deliver its product.

The main body of employees finished work at 11 p.m. on Friday, December 13 that evening, and left work at that time. About two or four employees who were scheduled to work until 11:30 p.m. that night were permitted to leave one-half hour early.[4] Accordingly, no unit employees remained in the plant after 11 p.m. that night, and none were scheduled to arrive at work for a third shift which begins at 11:30 p.m.

Reidinger stated that at the conclusion of the bargaining session, Respondent ordered that the plant gates be locked and no one allowed in.

Union negotiator Stephenson stated that at the end of the negotiation session, he believed that the parties were still making movement toward a new contract. He conceded that Respondent presented a final offer that evening, which the Union would not recommend for ratification. He further said that the Union was "pushing" to negotiate the following day. The Union wanted to vote on Respondent's offer on Monday morning.

Stephenson further stated that after Respondent presented its final offer, the Union requested a bargaining session the following day. Respondent was supposed to inform the Union whether that was acceptable, but never did so. He further stated that the Union was not planning a strike for Monday, and had asked to continue negotiations on December 14, so that union members could vote on the proposal on Monday. Respondent said that it would inform the Union whether it agreed.

Respondent's official Orlowski testified that the Union asked that negotiations continue while they worked. This request was refused because Orlowski feared that a sudden strike called while the plant was in production would leave the product at risk since vessels and lines would be filled with chemicals, and materials may be left unpackaged.

[4] Reidinger stated that the employees were permitted to leave work early because of a (a) practice in past negotiations, (b) concern over a spill of chemicals in the plant that night, (c) belief that employees were "slowing down", and (d) concern regarding the Union's confrontational approach toward negotiations.

4. Were employees scheduled to work on the weekend of December 14

There is a dispute concerning the date the lockout began. General Counsel states that it began shortly before midnight on December 13. Respondent asserts that the lockout began one day later, at 12:01 a.m. on December 15.

There was extensive testimony concerning whether employees were scheduled to work on Friday night, December 13, or that weekend. General Counsel asserts that employees were scheduled to work that weekend and that but for the illegal walkout, they would have worked.

Employee Sam Vinson testified that during the winter, the boilers operate all the time, but on a warm day, one boiler may be turned off. He stated that in the morning of December 14, he noticed a truck from an outside boiler company.

Vinson stated that the Respondent's boiler operators are regularly scheduled to work on weekends in the winter.

Vinson stated that other employees are also regularly scheduled to work on weekends during the winter including two drivers, Oria Lopez and Joe Simeon. He further stated that if the drivers refuse a weekend assignment, warehouse drivers are offered that overtime work which consists of warehouse duties such as picking orders and loading trucks. The actual driving work is contracted out to an outside carrier which makes marine deliveries.

In this connection, Vinson stated that the work that Lopez or Simeon would have been assigned, if they worked on December 14, would have been standby work. He stated that employees who were scheduled for weekend work were on standby, were on call, and were paid for 5 hours while on call. Vinson testified that Lopez told him that he was scheduled to work that weekend and was told by Respondent not to report to work.

Reidinger credibly testified, supported by the collective-bargaining agreement, and by the testimony of employee Vinson, that no third shift, which begins work at 11:30 p.m. was scheduled to report to work in the evening of Friday, December 13. Reidinger also testified that no employees were scheduled to work that weekend.

No production takes place at Respondent on the weekends. The boilers are needed during production which takes place Monday through Friday, and on weekends when the weather is cold. On weekends when the weather is warm, the boilers are shut down, and the boiler operators are told not to report.

Respondent official Orlowski credibly testified, supported by boiler room logs, that the boilers were not in operation on the weekend of December 14, because of the warm weather. He stated that ordinarily, during the weekend in the winter the boilers are operational, however when the weather is warm they are shut on weekends. On the weekend of December 14, the weather was warm, and therefore the boiler room operators were not required to be at work, and were not scheduled. They were informed on Wednesday, based on the weather forecast for the weekend, that they would not be needed. Instead, Respondent contracted with an outside company to provide boiler room operators, as needed, during the time of the lockout. They were not needed, and were not present during the weekend of December 14 and 15.

Documentary evidence supports a finding that a boiler repair company, Miller and Chiddy, did some repair work to the boiler on Sunday, December 15, and that Omne Maintenance performed certain work regarding the boilers during the period ending December 20. Orlowski was not certain whether any

work was done on December 13. However, he stated that Omne employees were on site prior to December 13, to be trained in the operation of the boilers.

With respect to standby drivers, Orlowski stated that Respondent's practice under the contract was that such drivers were paid to be on call at their homes. They were paid 5 hours standby pay. Orlowski stated that Respondent was not required to assign employees to standby work. He further stated that no one was scheduled for standby work for the weekend of December 14, because Respondent was not certain whether a new agreement would be reached.

I cannot credit Vinson's hearsay testimony concerning who was scheduled to work on the weekend of December 14.

I accordingly find, in agreement with Respondent, that no employees were scheduled to report to work on the weekend of December 14 and 15, and that employees were locked out of their employment beginning with the first shift, 12:01 a.m. on Monday, December 16.

On Sunday, December 15, Respondent called all employees and told them not to report to work on Monday. The lockout continued through December 23.

On December 23, following additional negotiations, a new final offer was made by Respondent, which the employees voted to accept. Respondent resumed its operations the next day.

B. Respondent's Defenses

1. The lockout was a defensive action to the union's strike preparations

Reidinger testified that he believed that the Union was preparing to strike regardless of the outcome of the negotiations. He stated that the Union's actions, set forth below, before and during the negotiations led him to believe that a strike would take place on the expiration of the contract.

There had been no strike incident to the 2 prior contract negotiations.

2. The Union's actions prior to the start of negotiations

(a) The Union was unusually confrontational prior to negotiations, filing many grievances and seeking arbitration on them rather than discussing them, (b) the Union had not sent a timely notice terminating the contract, and (c) the Union's distribution of the booklet *The New Blue Collar Movement.* The booklet, distributed weeks before negotiations began, states that it was written by Stephenson, the Union's chief shop steward. Its theme is that the union movement's influence and power are in decline, and sets forth methods by which unions can regain their strength to organize and bargain effectively. Some of the proposals include a "militant posture" consisting of nonviolent mass civil disobedience, direct action, and the "physical interference with the ability of companies to operate, produce and deliver goods."

3. The union's actions during negotiations

(a) Union negotiators were "repeatedly" 60 to 90 minutes late arriving at negotiations sessions (b) the Union's economic requests, including a 300 percent to 400 percent increase in pension contributions (c) Stephenson's direction to union members in the period December 9 to December 11, that they remove all personal items from their lockers (d) on December 11, Reidinger received a call from Patalero, the Union's head trustee, who requested that the negotiations be postponed because the union negotiators would be busy counting ballots in the upcoming Teamster election for International president, and (e) at the end of negotiations on December 13, Union assistant trustee Roy McClam requested that the Respondent give the Union a "last and final offer", declared that the parties had reached an "impasse", and refused to meet the next day, Saturday, December 14.

C. Analysis and Discussion

1. The alleged violation of Section 8(d) of the Act

The complaint alleges that Respondent engaged in an unlawful lockout in an effort to modify the contract which was due to expire in December 1996, and that it did so less than 60 days from the time that the Union served its notice to terminate the contract in violation of Section 8(a)(5) and 8(d) of the Act.

Section 8(d) of the Act provides in relevant part:

> Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications
>
> (3) notifies the Federal Mediation and Conciliation Services within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The notification obligations set forth in Section 8(d) are on the party which proposes the termination or modification of the contract. *United Artists Communications*, 274 NLRB 75, 77 (1995).

As set forth above, on October 28, the Union notified Respondent of its desire to terminate the agreement. The Union was therefore the initiating party.

General Counsel concedes that the Union's notice of termination to Respondent was untimely since it was not given at least 60 days prior to the December 14 expiration of the contract. General Counsel argues, nevertheless, that notwithstanding the untimely notice, Respondent was not entitled to lock out its employees until the passage of 60 days following the Union's October 28 notice.

General Counsel relies on *United Marine Division Local 333*, 228 NLRB 1107 (1977), and *Retail Clerks Intl. Assn. (California Assn. of Employers)*, 109 NLRB 754 (1954). Both cases involved situations where the union, the initiating party, failed to give the required 30-day notice to the mediation services pursuant to Section 8(d)(3) and the union struck. In both

cases, the Board found that the unions violated their obligation to bargain and Section 8(d) of the Act.

There are several facts which distinguish this matter from the above cases. First, in those cases the unions gave the required, timely 60-day notice to the employers but never notified the mediation service of the dispute. Here, the Union gave notice to the Respondent of its desire to terminate the contract, although such notice was untimely. Its 30-day notice to the mediation service was within the 60-day notification period pursuant to Section 8(d)(3).

Respondent relies on *United Artists Communications*, 274 NLRB 75 (1985), in support of its position that its lockout was not unlawful. In that case, the initiating party union notified the employer of its desire to negotiate a new agreement but did not notify mediation services. After negotiations, the expiration of the contract, and following the 60 day 8(d) notice served by the union on the employer, the employer, the noninitiating party, implemented its final proposal.

The Board, in overruling *Peoria Painting Contractors*, 204 NLRB 345 (1973), and *Hooker Chemicals Corp*., 224 NLRB 1535 (1976), held that the noninitiating party had no duty to notify mediation services in order to take otherwise lawful economic action. 274 NLRB at 77. Accordingly, the employer's implementation of changes in terms and conditions of employment following expiration of the contract was not unlawful.

In deciding *United Artists*, the Board stated that it was persuaded by the reasoning of the Seventh Circuit Court of Appeals in *Hooker Chem. & Plastics Corp. v. NLRB*, 573 F.2nd 965, 969 (7th Cir. 1978), which reversed the Board's *Hooker* decision. In *Hooker*, the court stated that an employer was permitted to lock out its employees on the "expiration of a contract when the union untimely notifies the mediation service" and that the limitations in strike activity placed on the initiating party by its late filing of the 8(d)(3) notice do not apply to a noninitiating party.

The court further stated that the fact that the initiating party is restrained from using its economic weapons because it gave untimely notice while the noninitiating party would not be is regarded as an "incentive [for the initiating party] to fulfill its statutory duty to give timely notice; the initiating party need only perform its statutory duty to avoid the restraint." 573 F.2d at 970.

The above cases did not deal with the facts present herein. Those cases dealt solely with the issue of notification to mediation services. It is important to emphasize that in all the above cases the required 60-day notice had been given by the initiating party. The notice to the mediation services was timely here when considered in relation to the 60-day notice served on the Respondent. However, it was the 60-day notice which was not timely.

It cannot be said that *United Artists* stands for the proposition that a noninitiating party is entitled to take economic action following expiration of the contract prior to the passage of 60 days following untimely notice to the noninitiating party. Different considerations apply to permitting a party to use untimely notice to support economic action under Section 8(d)(1) and 8(d)(3).

Thus, permitting a noninitiating party to lock out or strike after contract expiration, but only days after the 8(d)(1) 60-day notice has been served would vitiate the purpose of that section—which is to permit the parties to have time to negotiate a new contract and settle their differences. In discussing the ambiguities apparent in Section 8(d), the Supreme Court noted that there is a "dual purpose" in the Taft-Hartley Act—to substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 289 (1957), citing *Mastro Plastics v. NLRB*, 350 U.S. 270, 284 (1956).

This is different than the situation where the 60-day notice has already been served on the other party to the contract and there has been a failure to notify or an untimely notification to the mediation services. In that case, 60-day notification of proposed termination or modification having been given, the parties have already had an opportunity to bargain and reach agreement on the terms of a new agreement. Economic action therefore following expiration of the contract in those circumstances would be justified. *United Artists*, supra. Here, however, where the opportunity to bargain for a maximum of 60 days had not been realized, the noninitiating party's use of economic weapons is less justified.

Here, in contrast to the failure to serve the mediation services, the 60-day notice to Respondent was actually served on Respondent which need only wait until the expiration of the 60 day statutory requirement before it locked out its employees.

To find that the untimely service of the 60-day notice permits an employer to lock out its employees on the expiration of the contract but prior to the passage of 60 days would be an unjustifiable extension of *United Artists* and not warranted by the intent of Section 8(d) which is to provide an adequate opportunity to parties to negotiate their differences and reach agreement on a renewal collective-bargaining agreement.

This position is supported by *Carpenters District Council of Denver*, 172 NLRB 793, 795 (1968), where the employer timely served a 60-day notice and the union struck before the passage of 60 days following the notice. The Board held that the union's strike which was in violation of Section 8(d)(4) also violated its obligation to bargain. Thus, the noninitiating party, the union, was obligated to comply with Section 8(d). This case was left undisturbed by *United Artists* and has been adhered to in *Petroleum Maintenance Co*., 290 NLRB 462 fn. 3 (1988).

I accordingly find and conclude that Respondent's lock out of its employees prior to the passage of 60 days following the service of the October 28 notice by the Union violated Sections 8(a)(5) and 8(d) of the Act. *Bi-County Beverage Distributors*, 291 NLRB 466, 469 (1988).

Although I find that the lockout was unlawful because of Respondent's imposition of the lockout less than 60 days after the Union's notice to it, if the Board disagrees with this conclusion, and in the interest of completion I will discuss other defenses raised by Respondent.

2. Waiver

Although the Union's notice of proposed termination of the contract was untimely, Respondent nevertheless waived the untimeliness of the notice. In *Lou's Produce*, 308 NLRB 1194, 1200 fn. 4 (1992), the Board stated that "if the parties actually begin bargaining before the contract expires, they will be deemed to have waived the requirements that the notice of termination be in writing or that it be timely."

Here, the Respondent did not raise the issue of timeliness, did not refuse to bargain for that reason, and bargaining began before the contract expired. *Industrial Workers AIW Local 770 (Hutco Equipment)*, 285 NLRB 651, 654 (1987); *Hassett Maintenance Corp*., 260 NLRB 1211 fn. 3 (1982); *Ship Shape Maintenance Co*., 187 NLRB 289, 291 (1970).

3. Respondent's other defenses

Respondent also argues that it was justified in locking out its employees because (a) it reasonably believed that the Union intended to strike on the contract's expiration if its demands were not met, and (b) of its concerns that employees would engage in sabotage, and because of the nature of its product.

Respondent argues that certain factors, set forth above, which took place before and during negotiations convinced it that the Union would strike.

The facts that according to Respondent, the Union was unusually confrontational prior to negotiations during which it filed many grievances and sought arbitration rather than discussing them or that the Union had not sent a timely notice terminating the contract do not support a finding that the Union intended to strike on the contract's expiration. Nor does the allegation that the Union's negotiators were late in arriving at negotiations or its making extreme requests in bargaining establish that it intended to strike.

Respondent further contends that *The New Blue Collar Movement* authored by the Union's chief steward Stephenson similarly indicates an intention to strike. The booklet does propose a "militant posture" including nonviolent mass civil disobedience, direct action, and the physical interference with an employer's ability to operate, produce, and deliver goods. However, there was no specific reference in the material to Respondent or these negotiations. It was a general discourse on the state of the union movement in the United States. It cannot be concluded that the piece establishes that the employees intended to strike Respondent.

Respondent also contends that Stephenson's direction to union members during the period December 9 to 11 that they remove all personal items from their lockers indicates that the employees intended to strike. Stephenson testified that a strike was a "possibility" and the Union made certain preparations for one—including telling its members to remove such items. This direction indicates that employees were engaging in preparations for a strike, and that Respondent could reasonably believe, based on this direction, that they intended to strike. I am aware that Respondent's witness testified that union representatives did not tell him that there would be a strike, however it has been held that even where an employer was told that the union did not plan to strike it had a reasonable belief that a strike would occur, and its lockout was lawful. *C-E Natco/C-E Invalco*, 272 NLRB 502, 505 (1984).

At the final bargaining session on December 13, Respondent was asked for and presented its final offer. According to Respondent's negotiator Reidinger, union negotiator McClam said that the parties were at impasse, and the Union's bargaining committee would not recommend the offer for ratification, and that McClam refused to negotiate the next day, Saturday.

In addition, according to Reidinger, McClam requested that the ratification vote take place at the plant on Monday morning, following the contract's expiration. Reidinger refused.

In contrast, union negotiator Stephenson stated that he believed that the parties were making movement toward the end of that session. He conceded that Respondent's final offer was presented that evening which the Union would not recommend for ratification. However, he contradicted Reidinger's recollection that the Union refused to negotiate the next day. Stephenson stated that the Union was "pushing" to negotiate the next day. I credit Reidinger's version of this incident. McClam did not testify. According to Reidinger's credited version, McClam said the parties were at an impasse, and the Union requested Respondent's final offer. Even Stephenson concedes that Respondent presented its final offer at that meeting, and that the Union refused to recommend that it be ratified. Accordingly I cannot find that the Union offered to bargain the following day. I therefore credit Reidinger that the Union refused to bargain the next day, Saturday. In fact, no bargaining occurred the following day. That fact lends support to a finding that the Union refused to negotiate the next day.

General Counsel argues that despite that the Union would not recommend that the Respondent's final offer be ratified, the employees were free to reject that recommendation and ratify the contract. That may be true, but the question here is whether Respondent had a reasonable belief that the employees would strike. I find that it did, based on the direction that employees empty their lockers, the Union's request for a final offer, McClam's statement that the parties were at impasse, and the Union's refusal to recommend ratification of the contract. Thus, notwithstanding that Respondent was not specifically told that the employees would strike, it had a reasonable belief that they would do so. *American Ship Building* 380 U.S. 300, 327 (1965).

In *American Ship Building*, the Supreme Court upheld the use of a post-impasse lockout in support of an employer's bargaining position. The Board has also held lawful a pre-impasse lockout for the same purpose. *Darling & Co.*, 171 NLRB 801 (1968); *Harter Equipment Co.*, 280 NLRB 597 (1986). There was limited evidence given here concerning the bargaining which occurred in relation to whether an impasse in bargaining had actually occurred at the time of the lockout. Accordingly, I make no findings concerning that issue. However, under these precedents, assuming Section 8(d) was not violated, an offensive lockout would not violate Section 8(a)(3) of the Act. Here of course, no violation of that section has been alleged.

Respondent was further justified in locking out its employees due to the nature of its product. The Union requested that a ratification vote take place in the plant on Monday, December 16. Respondent reasonably believed that if the employees voted to reject its final offer at that time and began a strike the sudden cessation of work would be dangerous to the workers and injurious to its product.

Respondent's contention that it engaged in the lockout because of fear of sabotage prompted by a report of a chemical spillage on the last day of the negotiations is without merit.

There was no specific evidence of a deliberate spillage of materials, and no evidence that the Union or its agents caused the spillage. Although conceding that the spillage could not be attributed to the Union, the fact that Reidinger was told that similar incidents occurred at the end of prior negotiations is irrelevant. Such speculation and innuendo is not sufficient to provide a lawful basis for the lockout. Respondent has not shown that the lockout was prompted by a legitimate fear of employee vandalism. *ConAgra, Inc.*, 321 NLRB 944, 963 (1996). Similarly, there was no proof that any employee slowed down, or that if that had occurred, that the Union was responsible.

CONCLUSIONS OF LAW

1. Drew Division of Ashland Chemical Company, A Division of Ashland Oil, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Industrial and Allied Workers Local No. 97, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time production and maintenance employees and warehouse employees at Respondent's Kearny, New Jersey plant excluding office clerical employees, laboratory employees, professional employees, salesmen, guards and supervisors as defined in the Act.

4. At all times material, Local 97 has been and is now the exclusive collective-bargaining representative of the employees employed in the appropriate unit described above, within the meaning of Section 9(a) of the Act.

5. By locking out its employees during the period 12:01 a.m. on December 16 and 23, 1996, prior to the passage of 60 days following the Union's notification of its intention to terminate their contract, Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent locked out its employees from 12:01 a.m. on December 16 and 23, 1996, I shall recommend that it be required to make the unit employees whole for any loss of wages or other benefits they may have suffered by reason of the unlawful lockout, without prejudice to seniority and other rights, computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Drew Division of Ashland Chemical Company, A Division of Ashland Oil, Inc., Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully locking out its employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any loss of earnings and other benefits suffered as a result of the lockout from 12:01 a.m. on December 16 and 23, 1996, in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Kearny, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 12, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully lock out our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole our employees in the appropriate collective-bargaining unit set forth below for any loss of earnings and other benefits suffered as a result of the lockout from 12:01 a.m. on December 16 and 23, 1996.

All full-time and regular part-time production and maintenance employees and warehouse employees at Respondent's Kearny, New Jersey plant excluding office clerical employees, laboratory employees, professional employees, salesmen, guards and supervisors as defined in the Act.

ASHLAND OIL, INC.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."